

THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION  
Civil No: \_\_\_\_\_

FILED

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CLERK OF DISTRICT COURT  
WESTERN DISTRICT OF TEXAS

BY:                       
DEPUTY CLERK

THE VISION FORUM, INC.

Plaintiff

v.

THE BEHEMOTH

Defendant

COMPLAINT

SA09CA0059 FB

Plaintiff The Vision Forum complains of Defendant as follows:

**PARTIES**

1. The Vision Forum, Inc. ("Vision Forum") is a Texas corporation with its principle place of business in San Antonio, Texas.
2. Upon information and belief, The Behemoth is a California corporation, having its principle place of business at 1010 University Avenue, Suite 1880, San Diego, California 92103.
3. From public records of the United States Patent and Trademark Office, and on information and belief, Defendant owns United States Trademark Registration No. 2982171 ("171 Registration") for the mark THE BEHEMOTH.

**JURISDICTION AND VENUE**

4. This action arises under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and the Lanham Act, 15 U.S.C. § 1051 *et seq.*, to resolve actual and justiciable controversies now existing between the parties within the jurisdiction of this court.
5. Vision Forum seeks a declaratory judgment that it does not infringe Defendant's '171 Registration and that Vision Forum has not otherwise violated Defendant's rights in or to its

use of THE BEHEMOTH.

6. This Court has subject matter over this dispute pursuant to 28 U.S.C. § 1331, 1338, and 2201.

7. Upon information and belief, this Court has personal jurisdiction over Defendant by reason of Defendant's contacts with this district, to include the marketing and sales of its branded goods.

8. Venue is proper in this judicial district pursuant to 28 U.S.C. 1391(b).

### **FACTS**

9. Vision Forum is a family oriented, Christian media retailer.

10. Through its website at [www.behemoth.com](http://www.behemoth.com), Vision Forum hosts a cost effective download venue through which users may purchase downloads of Christian music, movies, audiobooks, sermons, and similar media. A true and accurate copy of Vision Forum's behemoth.com website homepage is attached hereto as Exhibit A.

11. Defendant is a computer game developer whose game titles include "Alien Hominid" and "Castle Crashers." Defendant produces "simple" or old-school style computer games. Defendant uses two dimensional, distinctive graphics in the video presentation of its games. Defendant's recognizable and distinctive style is based in large part from the fact its game graphics are hand drawn by the artist Dan Paladin, a.k.a. Synj. The central character and brand of Defendant is a distinctive little yellow alien. Defendant markets its video games through the Internet at [www.thebehemoth.com](http://www.thebehemoth.com). A true and accurate copy of Defendant's website homepage is attached hereto as Exhibit B.

12. Defendant's '171 Registration is for the mark THE BEHEMOTH, used in association with "computer software for use in video games."

13. Vision Forum does not market or sell computer software for use in video games.

14. On February 19, 2007, Vision Forum purchased the domain name www.behemoth.com to provide downloads of Christian media. Soon thereafter, Vision Forum announced through that URL the following, "Behemoth.com -- Coming Soon from The Vision Forum, Inc."

15. On or about October 2007, Vision Forum began promoting and marketing its forthcoming internet sales portal Behemoth.com.

16. At the time Vision Forum selected its Behemoth.com mark, Vision Forum was unaware of Defendant and of its use of THE BEHEMOTH in conjunction with the sale of video games.

17. On February 13, 2008, Vision Forum applied to the United States Patent and Trademark Office ("USPTO") to register the mark Behemoth.com, based on an intent to use basis.

18. After the USPTO allowed Vision Forum's trademark application to proceed to registration for "on-line retail store services featuring books, music, and motion pictures," Defendant opposed the application and initiated an opposition proceeding before the USPTO.

19. On October 6, 2008, Vision Forum began operating Behemoth.com as an active website, selling Christian books, music, movies and sermons.

20. Shortly after commencing sales on behemoth.com, through counsel, Vision Forum asked Defendant to review Vision Forum's Behemoth.com website to confirm the strikingly different appearance and goods and services as compared to Defendant's site. Vision Forum offered to negotiate a coexistence agreement between the parties in the hope and expectation Vision Forum could address any concerns Defendant might have about Vision

Forum's use of the URL www.behemoth.com.

21. On December 17, 2008, Defendant applied to the USPTO to register the mark THE BEHEMOTH, for use in conjunction with "key chains; key rings; decorative charms for mobile telephones and PDA's; accessories for mobile telephones and PDAs; clothing, headwear and footwear; sporting equipment; surf boards and parts and accessories therefore; skateboards and parts and accessories therefore; skim boards; toys including figurines; on-line retail store services featuring books, clothing, headwear, footwear, electronic goods and accessories therefore, music, toys, sporting goods and equipment, computer software and video games."

22. On January 13, 2009, through counsel, Defendant sent a cease and desist letter to Vision Forum, claiming that Vision Forum's website at www.behemoth.com intentionally and willfully infringed Defendant's trademark rights, to include its federal rights in its '171 Registration. A true and accurate copy of Defendant's demand letter is attached hereto as Exhibit C.

23. In the cease and desist letter, Defendant implies it may commence litigation against Vision Forum if Vision Forum does not acquiesce to Defendant's demands.

24. Vision Forum selected the www.behemoth.com URL and Behemoth.com trademark in good faith, without actual knowledge of Defendant or its mark, and without any intention of associating its services with anyone other than Vision Forum.

25. In an effort to assuage Defendant's concerns, Vision Forum has included the following disclaimer on each page of its website: Behemoth.com is in no way affiliated or associated with THE BEHEMOTH. Vision Forum even links "THE BEHEMOTH" to Defendant's website.

26. As shown in Exhibits A and B hereto, the context in which each party makes use

of the word "Behemoth" in their commercial applications is strikingly different from the other in appearance, meaning, and commercial impression.

27. Defendant uses its THE BEHEMOTH mark in conjunction with the highly recognizable and distinctive art of Dan Paladin, which art is strikingly dissimilar from anything found on Vision Forum's [www.behemoth.com](http://www.behemoth.com) website.

28. Defendant's cartoon alien video games are entirely dissimilar and distinguishable from any goods or services found on Vision Forum's [www.behemoth.com](http://www.behemoth.com) website or sold under the Behemoth.com mark.

29. Upon information and belief, the parties market and sell their respective goods to entirely different groups of consumers.

30. Upon information and belief, the parties use entirely different marketing channels to promote and advertise their respective goods and websites.

31. The parties' respective goods and services are not sold together or in close proximity to each other.

32. Upon information and belief, customers of Defendant's computer games and related goods and services use care and deliberation in purchasing Defendant's goods and services.

33. The customers of Vision Forum are highly conscientious of the literature, books, sermons, music and movies that they buy to include those that they buy from Vision Forum through the [www.behemoth.com](http://www.behemoth.com) website.

34. Accordingly, the parties' relevant consumers exercise a high degree of care in their purchase of each party's respective goods.

35. Despite Vision Forum having announced and promoted the URL and its trademark Behemoth.com for over a year, Vision Forum is not aware of any instances of actual confusion or even misdirected inquiries relevant to Defendant The Behemoth.

36. There is no reasonable likelihood of consumer confusion based on Vision Forum's use of Behemoth.com or related URL.

37. Defendant's legal threats and allegations and administrative proceedings against Vision Forum regarding Behemoth.com have given Vision Forum a reasonable apprehension of imminent legal action and have disrupted and interfered with Vision Forum's ability to offer and sell its products on www.behemoth.com without risk of incurring potential liability.

#### **COUNT I: DECLARATORY JUDGMENT**

38. Vision Forum re-alleges paragraphs 1-37.

39. Vision Forum has not infringed and does not infringe U.S. Trademark No. 2982171, nor has Vision Forum actively induced others to infringe U.S. Trademark No. 2982171, nor has Vision Forum infringed or violated any other of Defendant's rights under the Lanham Act.

40. Vision Forum has not infringed any federal, state or common law or related rights of Defendant, nor has Vision Forum actively induced others to infringe any such rights of Defendant.

41. A declaration by this Court establishing Vision Forum's non-infringement and non-violation of Defendant's rights is reasonably calculated to resolve these disputes between the parties and allow Vision Forum to continue its business activities without fear of potential liability and imminent and unnecessary litigation by Defendant.

**PRAYER FOR RELIEF**

Vision Forum respectfully prays that:

A. This Court enter declaratory judgment that Vision Forum does not infringe and has not infringed U.S. Trademark No. 2982171 or any other legitimate trademark or related rights of Defendant.

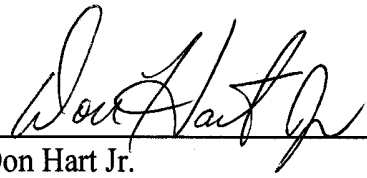
B. The costs of this action and prejudgment interests be taxed against Defendant.

C. The Court grant Vision Forum such other and further relief as the Court may deem just and proper.

**VISION FORUM DEMANDS A TRIAL BY JURY.**

Respectfully submitted, this the 23<sup>rd</sup> day of January, 2009.

**LAW OFFICE OF DON HART**  
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